NO. 47402-6-II

IN THE COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

CLARK COUNTY SUPERIOR COURT NO. 13-2-00572-1

PARKER ESTATES HOMEOWNERS ASSOCIATION,
a Washington non-profit corporation,
Appellant.
v.

WILLIAM PATTISON/LESLEY PATTISON,
Respondents.
v.

BLUESTONE & HOCKLEY REALTY, INC.,
dba BLUESTONE & HOCKLEY REAL ESTATE SERVICES,
Appellant.

BRIEF OF APPELLANTS

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I. Introduction

The issue at the heart of this case is what happens to a homeowner's association board of directors when the annual meeting of the homeowners at which an election is to occur fails to attract the requisite attendance to establish a quorum. There would seem to be two options. The first is that the existing board would remain in place and appoint replacements to fill any open positions. The other option would be for the board to disband leaving the association with no entity to manage its affairs.

The board of directors of Parker Estates Homeowners Association (hereinafter "PEHA") chose the former option, which is consistent with both its bylaws and with the statutory scheme outlined in the Nonprofit Corporation Act (RCW 24.03 et. seq.). In ruling in favor of the respondents, William and Lesley Pattison (hereinafter "the Pattisons"), the trial court essentially concluded that the latter option was required. The court then compounded its error by holding that the absence of a legitimate board of directors relieved the Pattisons of their obligation as members of PEHA to pay the annual assessments which fund the association. The trial court erroneously held that the lien filed by PEHA to collect those outstanding assessments was improper. Finally, the trial

court erred in entering judgment against the property management company, Bluestone & Hockley Realty, Inc. (hereinafter "Bluestone") despite the fact that no evidence of any wrongdoing by Bluestone was ever presented and the remaining causes of action contained in the counterclaim and third-party complaint included no allegations whatsoever related to Bluestone.

These rulings are contrary to statutory authority and common sense. Appellants respectfully request that this court correct these errors, reverse the trial court's rulings, and grant summary judgment in their favor.

II. Assignments of Error

1. The trial court erred in ruling that the PEHA board of directors was not properly constituted.
2. The trial court erred in ruling that the Pattisons were relieved of their obligation to pay assessments.
3. The trial court erred in ruling that the lien filed by PEHA against the Pattisons was invalid.
4. Based on these errors the trial court should have denied Pattison's Motion for Summary Judgment and granted PEHA and Bluestone's Motion for Summary Judgment.

5. The trial court erred in extending the judgment in this case to third-party defendant Bluestone.

Issues Pertaining to Assignments of Error

1. Is a board of directors for a homeowners association properly constituted where willing directors remain in place following a series of annual meetings at which no quorum was obtained, where the bylaws provide that officers shall hold office for one year, or until the respective successor of each officer is elected, and where the board has appointed other members to fill vacant positions on the board?
2. Is a member of the association relieved of his or her obligation to pay annual assessments due to the absence of a quorum at the annual meeting of the homeowners?
3. Is a lien filed by the association against a homeowner who has never paid annual assessments valid where the association board of directors is constituted as described in issue number one?
4. Where the association board of directors was constituted as described above, was it error for the trial court to grant the homeowner's motion for summary judgment finding the lien invalid and granting declaratory relief; and to deny the

association's and property management company's motion for summary judgment?

5. Where the homeowner stipulated to a dismissal of the only two causes of action which alleged wrongdoing on the part of third-party defendant property management company, and where the Order on Summary Judgment makes no mention of the property management company, was it error to enter judgment against that property management company?

III. Statement of the Case

PEHA is an association made up of 195 owners of single-family homes in the Parker Estates development located in Camas, Washington. (CP 49). It was originally developed by Donco, Inc. in 1994. Bylaws for the association were signed by Donald Holsinger, who was president of Donco, Inc. and was initial president of PEHA, on October 6, 1994. They were recorded with Clark County the following day. (CP 173). Covenants, Conditions and Restrictions (CC&Rs) were subsequently recorded with Clark County on October 27, 2014. (CP 154). The bylaws originally called for the association to be managed by four officers, a president, a vice president, a secretary, and a treasurer. (Bylaw §3.4 at CP 165-66). The term for each officer was "one year from the date of election,

or until the respective successor of each officer is elected." (Id. at CP 166). The officers were to be elected at an annual meeting of the homeowners. A meeting of the membership was not considered valid "unless a majority of the total membership shall be present or represented at such meeting by proxy." (Bylaw §3.5 at CP 166). Neither the bylaws nor the CC&Rs make any mention of how the bylaws were to be amended.

In 1998 the bylaws were amended to add §6.1 which provided that "[t]he affairs of the Association shall be managed by a Board of Directors consisting of seven (7) directors. The number of directors may be increased or decreased from time to time by approval of simple majority of Association members." (CP 175). The manner in which those directors would be selected is not spelled out in that amendment. On the face of the amendment it was noted that it was authorized by a majority of the officers and authorized by the membership by a mail-in written ballot vote of 71 for and 2 against on 21 May 1997. (CP 175).

In 2005, PEHA contracted with Bluestone to act as property manager for the association and to manage its day to day affairs. A Property Management Agreement was signed by five of the then six member board. (CP 233-34). One of the duties required of Bluestone

under that Agreement was the collection of annual assessments.[1] (CP 224). The purpose of the assessments was to create a fund to pay for "the actual and projected costs of construction, maintenance and repair of the common areas, open space areas and the wall that runs along Parker Road, and if any or if necessary, for roadways, easements, utilities and improvements which have either been expended, or are projected to be expended within a reasonably foreseeable time thereafter." (Bylaw §5.3 at CP 169-70). The costs for these maintenance and repairs was to be equitably allocated among the property owners on an equal share basis. (Id. at CP 170). That assessment currently stands at $160 per year.[2] (CP 116).

The Pattisons purchased a home in Parker Estates located at 3219 NW Ogden Street, Camas, Washington in August of 2009. At the time they purchased the home they were aware that they would be members of PEHA and that they would owe annual dues, which at that time were $180. They signed a document acknowledging that fact which confirmed that the next assessment they owed was due on June 1, 2010. (CP 191; 194). They did not pay that assessment, nor, by their own admission, have

[1] The terms "assessments" and "dues" will be used interchangeably throughout this brief.

[2] In 2011 the PEHA board voted to reduce the annual assessments from $180 to $160.

they paid any of the annual assessments since they've owned the home. (CP 191).

Pattison's refusal to pay their annual assessments is based on their assertion that the board of directors for PEHA was not properly elected, leaving the association powerless to collect assessments. The annual meeting of homeowners is held each year in May. In order to establish a quorum, 98 owners (a majority of the 195 total owners) must be present either in person or by proxy. (Bylaw §3.5 at CP 166). Association records show that a quorum was achieved at the 2006 meeting (29 in attendance, 69 proxies). (CP 142; 289). Every subsequent annual meeting through 2014 failed to attract enough members to establish a quorum and thus validate the meeting. (CP 142).

On those occasions where the quorum requirements were not met, current board members who were willing to continue serving on the board remained in place. Any openings were then filled by the remaining board members who voted to appoint any members who expressed a willingness to serve on the board. (CP 142-43). Because of a lack of interest, the board over the last several years has consisted of only four members with three of the seven positions remaining vacant. (CP 143).

Bluestone sent numerous letters and notices to Pattison (CP 219) in an effort to collect the outstanding assessments and in compliance with the Financial Penalties Resolution (CP 178-80) and the Resolution for Collection of Unpaid Charges (CP 182-85). Pattison steadfastly refused to pay the overdue assessments as well as the accumulated interest and late fees. PEHA ultimately turned the matter over to legal counsel who filed a lien on behalf of the association and subsequently filed this action to collect the unpaid assessments. (CP 1-4).

Pattison styled the answer to the complaint as an Answer, Counterclaim, and Third-Party Complaint, identifying Bluestone as the third-party defendant. (CP 5-9). While the pleading did include an answer and a counterclaim, the text of the pleading did not include a third-party complaint. *Id.* The pleading included four claims for relief: (1) usury; (2) frivolous lien; (3) Washington Consumer Protection Act (CPA); and (4) declaratory ruling on two issues, first that the PEHA board was not properly formed, and second, that the contract with Bluestone was null and void. (CP 7-8).

The parties filed cross-motions for summary judgment. Following oral argument, the trial court took the matter under advisement. The court requested additional briefing after being alerted to a recent ruling in the

case of *Club Envy of Spokane, LLC v. The Ridpath Tower Condominium Association*, 184 Wn. App. 593, 337 P.3d 1131 (2014). The court considered additional briefing and oral argument and ultimately ruled in favor of Pattison, granting their motion for summary judgment and denying appellants' motion. The court signed a detailed order vacating the lien filed by PEHA and holding that the formation of the PEHA board of directors was improper, was contrary to the bylaws, and failed to comply with corporate formalities. (CP 362-66). The court declined to find that the contract between PEHA and Bluestone was void. (Compare Proposed Order at CP 344 with Order as entered at CP 364-65). The order did not specifically address the third-party complaint, nor did it identify any wrongdoing on the part of Bluestone, nor for that matter even mention Bluestone by name.

The court's order did not address respondents' claims alleging usury and CPA violations. The parties subsequently agreed to a stipulated dismissal of those claims. (CP 379-80). On May 8, 2015, the trial court entered judgment, over Bluestone's objection (CP 411-15), against both PEHA and Bluestone. (CP 403-06). The amount of the judgment was $34,988.50, made up entirely of respondents' attorney's fees and costs. (CP 405). This appeal ensued.

IV. Argument

1. The standard for review is *de novo*

Where, as here, the issue is whether the trial court properly granted or denied a motion for summary judgment, the court reviews the matter de novo, performing the same inquiry as the superior court. *Hisle v. Todd P. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004).

> Summary judgment is appropriate only if the pleadings, affidavits, depositions, interrogatories, and admissions on file demonstrate an absence of any 'genuine issue [of] material fact and . . . the moving party is entitled to a judgment as a matter of law.'

Peterson v. Kitsap Comm. Fed. Credit Union, 171 Wn. App. 404, 416, 287 P.3d 27 (2012) (*quoting* CR 56(c)). All facts submitted, and all reasonable inferences must be construed in favor of the non-moving party. *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996). If reasonable persons could reach only one conclusion after reviewing all of the evidence, then summary judgment is proper. *Vallandingham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

2. PEHA is both authorized and required to collect assessments

When they purchased their home in 2009, the Pattisons became members of PEHA. They concede this fact. (CP 204). They likewise concede that the purchase subjected them to certain covenants contained in

the governing documents which included both the CC&Rs and the bylaws. As Pattison's Memorandum in Support of their Motion for Summary Judgment noted,

> [t]he Bylaws also contained both negative and affirmative covenants affecting the lots of the subdivision. In particular, this document established the Parker Estates Homeowner Association ("PEHA") for the "administration of common areas, open space areas and the wall that runs along Parker Road, and if any or if necessary, for roadways, easements, utilities and improvements or activities as the association chooses to undertake from time to time." ([citing bylaws] §1). The document also authorized PEHA to assess property owners within the subdivision for the cost of, among other things, the construction, maintenance and repair of common areas, and established lien rights against the property's owner's property in the amount of the assessment. ([citing bylaws] §4.1).

(CP 125).

PEHA's authority to collect assessments from its members is not in dispute. That authority is granted both by statute and by the bylaws. The Homeowner Association (HOA) Act provides in relevant part:

> Unless otherwise provided in the governing documents, an association may:
>
> . . .
>
> (2) Adopt and amend budgets for revenues, expenditures, and reserves, and impose and collect assessments for common expenses from owners;
>
> . . .

> (11) Impose and collect charges for late payments of assessments and, after notice and an opportunity to be heard by the board of directors or by the representative designated by the board of directors and in accordance with the procedures as provided in the bylaws or rules and regulations adopted by the board of directors, levy reasonable fines in accordance with a previously established schedule adopted by the board of directors and furnished to the owners for violation of the bylaws, rules, and regulations of the association;
>
> (12) Exercise any other powers conferred by the bylaws;

RCW 64.38.020. The HOA Act, passed in 1995, is based on the Uniform Common Interest Ownership Act (UCIOA) as drafted by the National Conference of Commissioners on Uniform State Laws in 1994. *Casey v. Sudden Valley Community Ass'n.*, 182 Wn. App. 315, 326, fn. 6, 329 P.3d 919, (2014).

The bylaws go beyond simply authorizing the association to collect assessments from its members (bylaw §4.1 at CP 167-68), but they mandate that collection. Bylaw §5.3 identifies the levying and collection of assessments as well as the recording of liens against non-paying owners, as *duties* of the association, not simply powers granted to it. (CP 169-70).

3. The composition of the PEHA board is consistent with both the bylaws and statutes

The Pattisons admit that they have never paid any of the annual homeowner's assessments since the time they purchased their home. (CP 191). As noted above, they also concede that PEHA has the authority to collect those assessments and to record liens against delinquent homeowners. (See, Pattisons' Response to Plaintiff's and Third-Party Defendants' Motion for Summary Judgment at 2, lines 21-22, CP 248, and Pattison's Rejoinder at 3, lines 18-19, CP 336). The sole basis of their refusal to pay annual assessments is their belief that the PEHA board of directors was not properly elected. They argue that §3.5 of the bylaws requires 50% of the owners to be present in person or by proxy in order for the election of officers to be valid.

a) Willing members of the board serve until a successor is elected

Available records of PEHA only go back to 2005. Those records show that from 2007-2014 there was a turnout at the annual homeowners meeting of less than 50%. As board president Barry Wright testified in his declaration, meeting minutes from 2006 show that a quorum was obtained that year.[3] (CP 142). The issue this court must address is, what happens to

[3] The only disputed issue of fact in this case is whether the turnout at the 2006 annual meeting constituted a quorum. A hand-notated roster at that meeting reflects 29 persons present and 69 proxies for a quorum of 98 owners. CP 289. The Pattisons dispute this

the existing board of directors when the following year's annual meeting fails to attract a quorum? The answer is found in the bylaws themselves. §3.4 provides:

> All officers shall hold office for a terms [sic] of one (1) year from the date of election, *or until the respective successor of each officer is elected.*

CP 166 (emphasis added). This is consistent with the provisions of the Nonprofit Corporation Act which provides in relevant part:

> [D]irectors shall be elected or appointed in the manner and for the terms provided in the articles of incorporation or the bylaws. Directors may be divided into classes and the terms of office and manner of election or appointment need not be uniform. Each director shall hold office for the term for which the director is elected or appointed *and until the director's successor shall have been selected and qualified.*

RCW 24.03.100 (emphasis added). The purpose of this language in both the bylaws and statute extending the term of office until a successor has been selected seems clear. It provides a stopgap and leaves a managing entity in place where a subsequent election fails to produce a succeeding director.

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count. For purposes of analyzing the Pattisons' Motion for Summary Judgment it must be assumed that a quorum was obtained. *Marquis v. City of Spokane*, 130 Wn.2d at 105.

b) Board members are empowered to fill vacancies on the board

The next question is what to do when vacancies occur on the board. It is a simple fact of life with Homeowners Associations that vacancies on the board occur when board members either move away or tire of the time commitment that these volunteer positions require. When board members resign, the remaining members of the board are entitled by statute to fill those vacancies.

> Any vacancy occurring in the board of directors and any directorship to be filled by reason of an increase in the number of directors may be filled by the affirmative vote of a majority of the remaining board of directors even though less than a quorum is present unless the articles of incorporation or the bylaws provide that a vacancy or directorship so created shall be filled in some other manner, in which case such provision shall control. A director elected or appointed, as the case may be, to fill a vacancy shall be elected or appointed for the unexpired term of his or her predecessor in office.

RCW 24.03.105. This is precisely how vacant positions on the PEHA board of directors have been filled as explained in the Declaration of Barry Wright (CP 142). Mr. Wright's appointment to the board is an excellent example. As he explained, he and two other home owners were nominated to fill three vacant positions on the board in June of 2007 following the resignation of three board members from the previous year. They were unanimously voted in by the remaining members of the board.

(CP 142). This is precisely what is contemplated by the statute quoted above. In communities such as Parker Estates where assembling a quorum of homeowners is a rare occurrence, it is not unusual to have a board of directors comprised primarily of directors appointed by others. This is specifically discussed in a reference material often relied upon by HOAs in the State of Washington., 2012 HOA Book – A Resource for Washington State Homeowners' Associations, prepared by the Condominium Law Group. (CP 321-323). Chapter 7 of that resource entitled "Board of Directors: Can they be "elected" without a quorum?" includes the following:

> If a quorum is not met, the association may set another meeting for a later date to elect the board. If there are incumbents on the board, those directors will continue holding office until an election with a proper quorum is held. The board of directors may, if provided for in the governing documents, appoint members to fill vacancies until a meeting with a quorum is held.
>
> Board members remain in office until their terms have expired, but continue in office after that until a new director is either elected or appointed. *It is not uncommon for an association's board to be comprised of directors appointed by other directors, and to have no elected board members, because the community cannot get a quorum of association members to meet and elect the board over a period of years.*

2012 HOA Book – A Resource for Washington State Homeowners' Associations (CP 322) (emphasis added) (footnoted citations omitted).

c) RCW 64.38.025(2) permits the filling of vacancies on the board

The Pattisons' response to this argument has been two-fold. First they have attempted to rely on RCW 64.38.025(2) which provides that a board of directors of a HOA may not elect members of the board. That statute provides:

> The board of directors shall not act on behalf of the association to amend the articles of incorporation, to take any action that requires the vote or approval of the owners, to terminate the association, to elect members of the board of directors, or to determine the qualifications, powers, and duties, or terms of office of members of the board of directors; *but the board of directors may fill vacancies in its membership of the unexpired portion of any term.*

RCW 64.38.025(2) (emphasis added). It is this last clause contained in the statute which permits the PEHA board to vote in owners to fill vacant spots on the board. This is what the PEHA board has done.

d) The *Community & Health Services* case is distinguishable

The Pattisons' second argument is that the language in the bylaws, "or until the respective successor of each officer is elected", does not operate to continue that officer or director in office until a successor has been chosen. For this proposition they rely on the case of *Community & Health Services v. N.W. Defenders Assn. et.al.*, 118 Wn. App. 117, 75 P.3d 583 (2003). That case, however, addressed a separate question, which was

whether that language operated to keep a director in office who had previously resigned. In *Community & Health Services*, a nonprofit corporation, Northwest Defenders Association, had a contract with the county to provide indigent legal services. Following a county audit in 2002 it was learned that the four members of the board of directors for Northwest had all formally resigned more than five years earlier with no replacements being appointed. Thus there had not been an active board of directors since 1995. In an effort to stave off the appointment of a receiver, management, in 2002, recruited a new board of directors and obtained signatures from each of the resigned board members consenting to the selection of the new board. This effort was rejected by the trial court which entered an order appointing a receiver. That order was upheld on appeal.

The issue was whether the former board of directors could continue to act on behalf of the corporation following their resignation. The court held that language in RCW 24.03.100, the Nonprofit Corporation Act, providing that a director "shall hold office for the term for which the director is elected or appointed and until the director's successor shall have been selected and qualified" does not keep a director in place after he or she has resigned. The court noted:

> The trial court wisely refused to endorse, as a principle of law controlling all nonprofit corporations, the notion that corporate directors can be held in office against their will until they elect their replacements. We adopt the general rule and conclude as a matter of law that the resignations of Northwest's board members were effective when tendered. The consent forms signed by in 2002 were ineffective to create a new board because, having resigned more than five years earlier, the former members no longer had authority to act for the corporation.

Id. at 125-26.

This same ruling is not applicable in the present case. There has been no action taken by any director following a resignation. The members of the board who remained in place have all willingly continued to serve in that capacity despite the absence of a quorum at the annual meetings. If the Pattisons' interpretation was correct that the directors' terms could not exceed one year, it would render the language contained in Bylaw §3.4 "or until the respective successor of each officer is elected" meaningless. It is black letter law that a document or statute should not be interpreted such as to render any portion of it meaningless. *Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 487, 209 P.3d 863 (2009).

4. The trial court erred in ruling that the PEHA board was not properly elected

The trial court's Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiff and Third-Party Defendant's Motion for Summary Judgment (hereinafter "the Order") is flawed in numerous

respects. At page 3 of the Order, the court outlines its findings which include the following:

1. PEHA failed to follow its own bylaws when electing the board of directors;
2. PEHA has not obtained a quorum required to elect officers since at least 2006;
3. The PEHA board is not and was not properly elected; and
4. The PEHA board failed to follow corporate formalities with respect to elections.

CP 364. As the analysis above makes clear, each of these findings (with the exception of no quorum since 2006) is erroneous. There are a total of two bylaw provisions which relate to elections. They are §§3.4 and 3.5 (CP 165-66) which read, in their entirety, as follows:

> 3.4 Officers. The officers of the association shall consist of a President, a Vice President, a Secretary, and a Treasurer. All officers shall hold office for a terms [sic] of one (1) year from the date of election, or until the respective successor of each officer is elected. The duties of the President shall be to preside at all meetings of the association and, in general, to serve as an executive officer of the association. The Vice President shall serve in the incapacity of the President, or in the event of his resignation. The Vice President shall also preside at meetings of the association in the absence of the President. The Secretary shall keep records and minutes of the association and shall be responsible for the safekeeping of the funds of the association. The association shall, by action in adopting its bylaws, delegate such other and further responsibilities to the officers as shall be deemed appropriate, and shall impose such other restrictions and qualifications upon the officers as the association shall determine. The bylaws may also provide for additional officers and for

an executive committee to be elected by the membership.

3.5 Elections. Election to officer shall be by majority vote. A meeting of the membership shall not be valid unless a majority of the total membership shall be present or represented at such meeting by proxy. Each member shall be entitled to one (1) vote EXCEPT as provided for in Paragraph 3.2 hereinabove. Written proxies may be filed with authorizing designated persons to vote for a member.

There was no breach or violation of these bylaws in any manner, and any finding that there was is simply not supported by the evidence. The board is not able to force members of the association to attend an annual meeting. The trial court's decision begs the question alluded to in the introduction of this brief: What is the board to do when fewer than 50% of the members attend the meeting to elect the board? Under the Pattison's analysis the board would essentially be dissolved leaving the association with no entity to manage its affairs, no one to enter into contracts with maintenance companies or to sign checks on behalf of the association. This is not a feasible option. The alternative is that willing board members remain in place and vacant positions are filled by a majority vote of the remaining board members. This is the method which is consistent with both bylaw and statutory language and which allows for continuity in

the leadership of the association. This is the method chosen by the PEHA board and is both proper and consistent with corporate formalities.

5. The trial court erred in ruling that Pattisons were relieved of their obligation to pay assessments

The trial court, based on its earlier erroneous findings, subsequently concluded at finding #5 of the Order that "the PEHA board has no authority to act for PEHA as it applies to Pattisons." (CP 364). It then held that all actions taken by the association against Pattisons including the assessments, penalties, late fees and interest as well as the lien filed against Pattison were null and void and of no effect. (CP 365). In reaching this result the trial court relied heavily on the case of *Hartstene Point Maintenance Assn. v. Diehl*, 95 Wn. App. 339, 979 P.2d 854 (1999). That reliance was misplaced.

a) Reliance on the *Hartstene Point* decision was misplaced

The *Hartstene Point* case involved a decision made by the architectural control committee (ACC) within a homeowners association. An individual homeowner (Diehl) had applied to the committee to remove a number of trees on his property to construct a residence. The committee approved the application with the exception of one 26" diameter cedar tree approximately 15 feet from the location of the proposed home. Mr. Diehl removed that tree anyway. He was subsequently fined $1000 for cutting

the tree. He appealed to the Board of Trustees which denied his appeal. The association ultimately filed suit to collect that fine as well as several others on unrelated issues. Following a six day trial the court found in favor of Mr. Diehl on several of the unrelated claims but concluded that he violated the laws of Hartstene Point by cutting the one tree. On appeal that finding was reversed as the court concluded that the ACC was not properly constituted. The CC&Rs provided that the ACC would be composed of three members, at least two of whom were members of the board. In fact the ACC was made up of 5 individuals, only one of whom was a board member. The appellate court therefore reversed the trial court's finding that the tree cutting violated the laws of Hartstene Point. *Id.* at 346.

That case is distinguishable in several respects. First, and most importantly, the composition of the ACC in that case clearly contravened the requirements of the CC&Rs. As spelled out in detail in section 3 above, there has been no violation of the governing documents by the PEHA board. In the present case, the only question is what effect the absence of a quorum has on the existing board of directors. As explained above, acting and willing board members remain in place in the absence of a quorum. Thus the board of PEHA is properly constituted.

Moreover, the decision being challenged in *Hartstene Point* was a single discretionary ruling on the part of a single committee about the removal of a tree. Here the Pattisons are arguing that every action ever taken by the board of directors is a legal nullity. (*See, e.g.* Pattison's Response Brief at 4, lines 8-9 at CP 250). In particular they are disputing the association's ability to collect annual assessments. Unlike in *Hartstene,* the collection of equal assessments is not only permitted but is mandated by the governing documents. §5.3 of the bylaws provides that the association shall have the *duty* to levy and collect assessments from each member. It goes on to note:

> The costs of maintenance and repairs as so determined shall be equitably allocated among the property owners on an equal share basis, each individual parcel bearing an equal assessment of the cost of maintenance of the common areas, open space areas and the wall that runs along Parker Road, and if any or if necessary, for roadways, easements, utilities and improvements.

CP 170.

b) An owner's obligation to pay dues is not dependent on the composition of the board

The maintenance and repair of common areas is the essential purpose of the association. (*See*, bylaw §1 at CP 164). The bylaws clearly intend for the cost of upkeep and maintenance of the common areas to be shared equally by all of the owners who are benefitted by such

maintenance. The concept of equal contribution from each owner is at the core of the UCIOA, upon which the HOA Act is based.

> [O]nce an assessment is made against any unit, all units, including those owned by the declarant, must be assessed for their full portion of the common expense liability.

Casey v. Sudden Valley Community Association, 182 Wn. App. 315, 331, at fn. 14, 329 P.3d 919 (2014) (*quoting*, Comment 1 to Section 3-115 of UCIOA). Neither PEHA nor the board of directors has breached the bylaws or statutes governing HOA's. The only violations of the bylaws which have occurred are that the Pattisons have refused to pay their share of these expenses and the trial court's order which singles out the Pattisons as being exempt from paying annual assessments owed by all of the other homeowners in the development.

The powers enumerated to the association stem directly from the association's governing documents, here, the CC&Rs and the bylaws. There is nothing in those governing documents which condition the payment of assessments for maintenance and repairs on the particular composition of the board of directors. It is not material whether the association is led by four officers, by seven directors, or by a single person. Each member of the association is obligated to pay an equitable share of the expenses to maintain and repair common areas regardless of who manages the affairs of the association. The Pattison's argument here

is the equivalent of a disgruntled tax payer who refuses to pay taxes under the theory that he doesn't believe the president was properly elected. That argument doesn't work on a national scale and there is certainly no basis to apply it on a local one.

The *association*, not the board is empowered to collect assessments. The *association*, not the board is empowered to file liens. Even if there was some irregularity in the composition of the board, which PEHA vehemently denies, it would not obviate any particular owner's obligation to pay annual dues. Without question, the Pattisons have benefited from the ongoing maintenance and repairs of the common areas at Parker Estates. To date, they have borne none of the cost. If nothing else, fairness demands that they pay their share of these expenses. The trial court's ruling that they are relieved of this obligation due to what it views as improper composition of the board is error which demands correction.

6. The trial court erred in quashing the lien filed by PEHA

Each of the trial court's rulings in this matter stem from its original improperly drawn conclusion that the board of directors of PEHA was not properly constituted. The Order provided at page 4:

> No genuine issue of material fact exists on Defendants claim that Plaintiff's lien at issue in this dispute recorded

> by PEHA against Pattison's property is invalid *because the PEHA board has no authority to impose assessments, fines and late fees and has no authority to record a lien.*

CP 365 (emphasis added). The Pattisons have already conceded that the association is empowered to file a lien against delinquent owners. (CP 336). That power is explicitly granted in the bylaws. See, bylaw §4.7 at CP 169 and §5.3(2) at CP 170. Thus, the only basis for the trial court's conclusion quoted above and its subsequent order quashing the lien is its belief that the board of directors was not properly constituted. Once that erroneous ruling is corrected each subsequent ruling based on that error should likewise be reversed.

7. Public policy supports a reversal of the trial court

While the trial court limited the Order to the Pattisons only, there is no legal basis for such a limitation. If the association is powerless to collect assessments from Pattisons because the board was not properly elected, then every other homeowner should be in the same position. The result of course is that the association would not only be left with no leadership, but no funding as well. Homeowners' dues are the only source of revenue for PEHA (CP 390) and act as the lifeblood of the association. If its sole source of funding were to disappear, the association would cease to function. At the very least no maintenance or repairs would occur.

As discussed above, the lack of a quorum at annual meetings for homeowners association and condominium association is not an uncommon occurrence. (CP 257). If low turnout at a meeting negated each member's obligation to pay assessments, then many condominiums and home developments around the state would be underfunded and unable to maintain common areas. This could lead to potentially dangerous conditions as buildings and common areas deteriorate. Of course property values would likewise suffer as properties and housing developments are no longer maintained. The possible ramifications of the trial court's ruling should not be taken lightly. As of 2014 Washington State ranked ninth in the nation in the number of estimated community associations. There are an estimated 10,150 community associations in the state with over 2,000,000 people living in such associations. While the assessments at Parker Estates are very modest, estimates of state-wide annual assessments total $2,100,000,000.[4] The prospect of defunding many of these associations simply because they are unable to attain a quorum at an annual meeting could potentially result in devastating consequences on a very large scale.

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[4] *2014 Community Association Fact Book for Washington*, published by Foundation for Community Association Research, p.11, excerpts of which are provided at Appendix A.

8. The 1998 Amendment to the bylaws was valid

Much of the Pattisons' briefing at the trial court level centered on their argument that the 1998 amendment to the PEHA bylaws, which created a seven member board of directors, was invalid. This issue should not be pertinent to this appeal as the trial court declined Pattison's request to rule on the validity of the amendment. (Compare Pattison's Proposed Order Granting Summary Judgment at p. 4 lines 12-15, (CP 345) with the Order as entered (CP 365)). Nevertheless, as the appellate court reviews the matter de novo, and the Pattisons will no doubt include the issue in their briefing, appellants will address the issue.

The Nonprofit Corporation Act provides that the affairs of a corporation shall be managed by a board of directors. RCW 24.03.095. Under the definition section of that Act, "'board of directors' means the group of persons vested with the management of the affairs of the corporation irrespective of the name by which such group is designated in the articles or bylaws." RCW 24.03.005. Thus, under the original PEHA bylaws from 1994, the board of directors would have been the four elected officers. In 1998 PEHA recorded an amendment to the bylaws adding the following section:

Directors

> 6.1 Number. The affairs of the Association shall be managed by a Board of Directors consisting of seven (7) directors. The number of directors may be increased or decreased from time to time by approval of simple majority of Association members.

CP 175. The revision stated that it was "duly authorized by a majority of its Officers and pursuant to action duly authorized by the membership in the Parker Estates Homeowners' Association, by a mail in written ballot vote of 71 for and 2 against on 21 May 1997." *Id.*

a) The Pattisons' challenge to the amendment is time-barred

Pattisons challenge the amendment arguing that only 73 ballots were received and therefore it was not approved by a majority of the owners. Their challenge to this amendment, 16 years after its passage, is not well taken. While there is no specific limitations provision as is provided for, for example, in the Washington Condominium Act (RCW 64.34.264(2) which precludes challenges to amendments adopted by the association more than one year after the amendment is recorded), the six year statute of limitations for written contracts would bar such a challenge. RCW 4.16.130. *See, e.g., Rodruck v. Sand Point Maintenance Commission*, 48, Wn.2d 565, 578, 295 P.2d 714 (1956) where the court held that an association's bylaws, in effect, constitute a contract between the association and its members.

b) The power to amend bylaws rests with the board

Even if such a challenge was allowed, it would fail due to the provisions of RCW 24.03.070. That statute provides that where the governing documents are silent as to how bylaws are to be amended (as they are in the present case), "[t]he power to alter, amend or repeal the bylaws or adopt new bylaws shall be vested in the board of directors …." Because the 1998 amendment was approved by a majority of the officers, it was valid. The fact that the amendment was also approved by an overwhelming percentage of owners who voiced an opinion on the issue shows that it had the support of membership as well as the board, though that vote was entirely unnecessary for the amendment's validity.

c) The *Club Envy* case does not apply

After the original briefing and oral argument to the trial court in this matter was concluded and while the case was under advisement, counsel for the Pattisons brought to the court's attention the recent decision in *Club Envy of Spokane v. Ridpath Towers Condo. Ass'n.*, 184 Wn. App. 593, 337 P.3d 1131 (2014). They argued that that case stood for the proposition that where an amendment was void from its inception, a challenge to the amendment was not time barred. In fact, the *Club Envy*

decision only underscores the differences between an amendment to a declaration and an amendment to bylaws.

The *Club Envy* decision involved the conversion of the Ridpath Hotel into condominiums. The declarant, an entity controlled by Greg Jeffreys, initially created an 18 unit complex. After selling some of the units, Mr. Jeffreys amended the Declaration of Covenants, Conditions and Restrictions (CC&Rs) to divide unit 18 into two separate units, units 18 and 19. Two months later he recorded a second amended declaration again subdividing unit 18 into units 18, 20 and 21. This second amended declaration effectively reduced each member's voting rights from 5.263 percent to 4.762 percent and converted some common elements to private ownership. During this period of declarant control, Mr. Jeffreys acted as president of the association. Evidence presented during the summary judgment motions included numerous declarations from condominium owners indicating that they did not approve of this change. *Id.* at 597.

More than four years later, Ridpath Revival, LLC (Revival) purchased units 20, 21 and 3, intending to develop the rooftop units 20 and 21 back into a luxury hotel. A majority of other owners desired to develop the tower into low-rent micro-apartments. These owners, collectively referred to in the opinion as Club Envy, sued for declaratory relief asking the court

to declare that the second amended declaration was void for lack of approval of the other owners. Revival's defense was based on the one-year statute of limitations contained in the WCA at RCW 64.34.264(2). That section provides:

> No action to challenge the validity of an amendment *adopted by the association pursuant to this section* may be brought more than one year after the amendment is recorded.

(emphasis added in *Club Envy*, 184 Wn. App. at 599-600). The court presented the issue as follows:

> Thus, our question becomes whether all amendments must be challenged within one year or solely those adopted by the association under the WCA.

Club Envy at 600. Ultimately the court determined that because the declarant unilaterally recorded the second amendment without authorization from the other affected owners in violation of the CC&Rs as well as the Washington Condominium Act (RCW 64.34.264(4)), the amendment was void and was not "adopted by the association pursuant to this section" and thus the one year statute of limitations did not apply. *Id.* at 601.

The amendment of the declaration at issue in *Club Envy* was void because it directly affected the ownership interests of the other condominium owners and did so without their approval in contravention

of the CC&Rs and the WCA. In contrast, the amendment at issue in the present case involved merely the number of directors. It was a bylaw amendment, not an amendment to the CC&Rs and therefore did not require a vote of the membership. There is no basis whatsoever to declare the amendment void. Moreover the two cases are distinguishable as the Washington Condominium Act doesn't apply in the present case. The Club Envy decision turned on whether the amendment had been "adopted by the association pursuant to this section" [RCW 64.34.264(2)]. PEHA did not attempt to rely on a one-year statute of limitations to challenge the amendment as these are not condominiums and thus the WCA is inapplicable. PEHA did, and continues to, take the position that a challenge to this 1998 amendment should be barred by the six year statute for written contracts. In this case, however, the statute of limitations is not necessary to bar the challenge as there is no valid basis for the challenge to the amendment in the first place.

d) Any challenge to the 1998 amendment is moot

The mootness of this entire line of argument is underscored by the fact that even if a challenge to the bylaw amendment was successful, this means that the board would return to being a four member board. Ironically, during the majority of time where PEHA had attempted to

collect assessments from Pattison (2010-2014) the board was functioning with only four members due to a lack of willing owners to serve as board members. (Wright decl. CP 143). Ultimately, the trial court declined to rule on this issue and the Pattisons have not cross-appealed leaving no reason for the appellate court to consider this amendment.

9. The trial court erred in granting judgment against Third-Party Defendant Bluestone

The final error committed by the trial court in this matter was the entry of judgment against third-party defendant Bluestone. The Pattisons' Counterclaim and Third-Party Complaint filed in this action raised four separate claims for relief: usury; frivolous lien; Consumer Protection Act, RCW 19.86 (CPA); and declaratory relief. (CP 7-8). Prior to entry of judgment the Pattisons stipulated to the dismissal of their claims for usury and CPA. (CP 379-80). With the dismissal of those claims, there is no longer any basis for any claim against Bluestone let alone basis for the entry of judgment against it. There was no evidence presented to the court that Bluestone had any involvement in the filing of a lien against Pattison. In fact, there is not even an allegation of Bluestone's involvement. The Second Claim for Relief contained in Pattison's original pleading states:

> 5.1 The lien placed on the Pattison property *by Plaintiff* is frivolous and made without reasonable cause, and/or is clearly excessive.
>
> 5.2 As a result of *Plaintiff* placing a frivolous lien on the Pattison property, the Pattisons are entitled to removal of the lien and recovery of their attorneys' fees and costs.

CP 8. The sole plaintiff in this matter is PEHA.

That lien was filed in the name of PEHA by legal counsel retained by PEHA. The only evidence presented to the trial court involving Bluestone was that a Bluestone representative authored notices sent to Pattisons as required by the Financial Penalties Resolution. (See, Declaration of Kane Thomas at ¶¶ 4-7 at CP 219).

With regard to the declaratory relief requested in Pattisons' fourth claim for relief, they sought for the court to declare as follows:

> 7.1.1 That there has been no proper formation of the Board of Directors and/or election of Officers;
>
> 7.1.2 That the Contract with Bluestone & Hockley Real Estate Services is null and void.

CP 8. Pattison included both of these declarations in their proposed Order (CP 345). The trial court did conclude that members of the board were not properly elected, but the court struck the language relating to the Bluestone contract noting that it was not consistent with its ruling. (CP 365). The Order entered by the trial court makes no reference to any improper action or failure to act on the part of Bluestone. In fact,

Bluestone is not even mentioned by name in the Order. (CP 362-66). To the extent that Pattisons' original pleading constitutes a valid third-party complaint, there are no remaining causes of action in that complaint which implicate Bluestone in any way. There has been no evidence presented of any wrongdoing on the part of Bluestone. As such, Bluestone was entitled to be dismissed from the action on summary judgment. Instead, the trial court included Bluestone as a judgment debtor without citing a single action taken by Bluestone that was improper. This is obvious error that cries out for reversal.

10. PEHA and Bluestone are entitled to an award of their attorneys' fees

Section 7.3 of the PEHA bylaws provide:

> 7.3 Costs and Attorneys' Fees. In the event suit of [sic] action is instituted to enforce any of the terms of this agreement, the prevailing party shall be entitled to recover from the other party such sum as the court may adjudge reasonable as attorneys' fees at trial or on appeal of such suit or action, in addition to all other sums provided by law.

(CP 172). Because the trial court granted summary judgment in favor of the Pattisons it awarded Pattisons their attorneys' fees and costs. This amount made up the entire judgment in this matter. (CP 405). Based on the arguments outlined above, this court is respectfully urged to reverse the trial court's decision and grant summary judgment to PEHA and Bluestone. In such case, not only are appellants entitled to recover their

attorneys' fees and costs on appeal but they would likewise be entitled to recover their fees and costs at the trial court as well.

V. Conclusion

PEHA and Bluestone have acted properly in attempting to collect the outstanding dues owed by the Pattisons. The trial court's conclusion that the PEHA board of directors was not properly constituted is not supported by the evidence and is contrary to the bylaws of the association and in conflict with RCW 24.03.100 and 24.03.105 which permit willing directors to remain in office until a successor has been properly elected and which allow for the appointment of members to fill vacant seats on the board. Because this erroneous conclusion reached by the trial court is the linchpin of every other ruling made by the court in its Order on Summary Judgment, the court's findings that PEHA's lien was invalid and that the Pattisons were relieved of their obligation to pay annual assessments must likewise be reversed.

PEHA and Bluestone should be entitled to summary judgment in their favor. The lien filed in this matter was authorized both by statute and by the bylaws of PEHA. There is no dispute that PEHA followed the procedures for collecting past due assessments as outlined in the Financial Penalties Resolution and the Resolution for Collection of Unpaid Charges.

Bluestone should additionally be dismissed because there are no remaining claims for relief in Pattisons' third-party complaint which implicate Bluestone.

The Pattisons concede that they have never paid any of the assessments paid by the other 194 members of PEHA. It is long past time to hold them accountable for their share of expenses. This court is respectfully urged to reverse the trial court, grant PEHA's and Bluestone's Motion for Summary Judgment and remand the case to the trial court for a determination of the total damages including overdue assessments, interest, penalties and costs of collection. In addition, this court should award PEHA and Bluestone their costs and attorneys' fees as the prevailing parties in this case.

RESPECTFULLY SUBMITTED this 23rd day of July, 2015.

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2014
Community Association Fact Book

for

Washington

FOUNDATION FOR COMMUNITY ASSOCIATION research

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The Foundation for Community Association Research (FCAR) was founded in 1975. FCAR is a 501(c)(3) organization that supports and conducts research and makes that information available to those involved in association development, governance and management.

FCAR provides authoritative research and analysis on community association trends, issues and operations. Our mission is to inspire successful and sustainable communities. We sponsor needs-driven research that informs and enlightens all community association stakeholders---community association residents, homeowner volunteer leaders, community managers and other professional service providers, legislators, regulators and the media. Our work is made possible by your tax-deductible contributions. Your support is essential to our research.

1.2 Population – Age, Household Type, Disability and Place of Birth

S0201: SELECTED POPULATION PROFILE 2011-2013 American Community Survey 3-Year Est.	Washington Estimate
SEX AND AGE	
Total population	6,896,071
Male	49.9%
Female	50.1%
Under 5 years	6.4%
5 to 17 years	16.6%
18 to 24 years	9.7%
25 to 34 years	14.1%
35 to 44 years	13.2%
45 to 54 years	13.9%
55 to 64 years	12.8%
65 to 74 years	7.6%
75 years and over	5.6%
Median age (years)	37.4
65 years and over	906,158
Male	45.1%
Female	54.9%
HOUSEHOLDS BY TYPE	
Households	2,634,496
Family households	64.3%
With own children under 18 years	28.7%
Married-couple family	49.4%
With own children under 18 years	20.1%
Female householder, no husband present, family	10.4%
With own children under 18 years	6.1%
Nonfamily households	35.7%
Male householder	17.3%
Living alone	12.8%
Not living alone	4.5%
Female householder	18.4%
Living alone	15.0%
Not living alone	3.5%
DISABILITY STATUS	
Total civilian noninstitutionalized population	6,789,761
With a disability	12.5%
PLACE OF BIRTH	
Native	5,973,943
Male	50.2%
Female	49.8%
Foreign born	922,128
Male	48.0%
Female	52.0%

Review the Selected Population Profile for All U.S. States.

1.3 Housing – With and Without a Mortgage by Age Group & Compared to U.S.

B25027: MORTGAGE STATUS BY AGE OF HOUSEHOLDER - Universe: Owner-occupied housing units	2009-2013 American Community Survey 5-Year Estimates		
	Washington		U.S
	Estimate	Percent	Percent
Total:	1,661,427		
Housing units with a mortgage:	1,186,017	71.4%	66.4%
Householder 15 to 34 years	158,534	13.4%	13.8%
Householder 35 to 44 years	268,182	22.6%	22.6%
Householder 45 to 54 years	327,796	27.6%	27.7%
Householder 55 to 59 years	149,079	12.6%	12.1%
Householder 60 to 64 years	120,516	10.2%	9.8%
Householder 65 to 74 years	120,778	10.2%	10.1%
Householder 75 years and over	41,132	3.5%	3.8%
Housing units without a mortgage:	475,410	28.6%	33.6%
Householder 15 to 34 years	15,134	3.2%	3.9%
Householder 35 to 44 years	24,647	4.3%	6.3%
Householder 45 to 54 years	59,924	10.4%	14.0%
Householder 55 to 59 years	51,023	8.9%	10.4%
Householder 60 to 64 years	66,047	11.5%	12.5%
Householder 65 to 74 years	123,362	21.5%	24.6%
Householder 75 years and over	135,273	23.6%	28.3%

Review All Housing With and Without a Mortgage for All U.S. States.

1.4 Property Values and Real Estate Taxes (RET) in 2013

State	Median Value of Homes	Median RET	RET Rank	Med. RET per 1,000 of value	RET Rate rank	Property Tax Share in S&L Government Revenue from Own Sources
Washington	$250,800	$2,743	13	0.97%	26	30.50%

Source: ACS, 2013; Annual Survey of State & Local Government Finances, 2011, NAHB Estimates.

See NAHB Eye on Housing Table 1.

Note: The median value is the mid-point of a frequency distribution where half of all values will be above the median value and half will be below that value. The mean is the average.

2. Washington Community Associations and Condominium Unit Owners 55+

2.1 Condominiums in 1980 & 1990

Condominium Units – Year	Number of Condo Units	Rank in Terms of All Condo Units	As a Percent All Housing Units	Rank in Terms of All Housing Units
1980	36,940	16	2.20%	14
1990	62,639	19	3.10%	21

U.S. Census Condominiums – Statistical Brief, 1994

2.2 Washington Community Associations – 2014

State	Association Rank	Estimated Number of Associations	Estimated Associations in the State as Percentage of All Associations	Estimated Number Living in Associations
Washington	9	10,150	3.0%	2,020,000

Estimated Board & Committee Volunteers	Estimated Value of Board & Committee Time	Estimated Value of Homes in Associations	Estimated Annual Assessments	Estimated Annual Reserve Fund Contributions
70,000	$2,400,000	$151,000,000,000	$2,100,000,000	$670,000,000

2012 Statistical Brief
2013 Statistical Brief
2014 Statistical Brief
and
Community Association Fact Book 2014

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **Brief of Appellants** on the following parties:

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by efiling a true and correct copy thereof to said parties on the date stated below.

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Transmittal Letter

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- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
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  Hearing Date(s): _____
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